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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1950**

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## No. 296

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GENEVIEVE JOHNSON,

*Petitioner,*

*vs.*

ELEANOR MUELBERGER,

*Respondent*

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**BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.**

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WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
*Bowen Bldg.,*
*Washington, D. C.,*
*Counsel for Petitioner.*

JOHN H. MUNLEY,
GEORGE J. MEADE,
*Great Neck, N. Y.,*
*Of Counsel.*

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### Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3). The judgment of the New York Court of Appeals was entered April 14, 1950 (R. 51). An order of this Court extending the time to file a petition for a writ of certiorari was granted by Mr. Justice Burton on July 7, 1950, extending such time up to and including September 9, 1950 (R. 53). Order granting Writ was entered November 6, 1950.

### Opinions Below

The opinion of the Surrogates Court is unreported but may be found at R. 39. The memorandum opinion of the

Appellate Division may be found in the record at p. 44 and is reported in 275 Appel. Div. 848. The opinion of the Court of Appeals appears in the record at p. 45 and is reported in 301 N. Y. 13 and 92 N. E. (2) 44.

## Questions Presented

1. Respondent, the daughter of decedent E. Bruce Johnson by marriage No. 1 [1] and sole legatee under his Will, contested in the New York Surrogate's court petitioner's election to take her widow's portion (as wife No. 3) on the ground that decedent's Florida divorce from wife No. 2, in which husband and wife both appeared, was invalid. The court below, reversing the Surrogate and the Appellate Division, held the Florida divorce invalid on the ground that the proceedings before the Surrogate showed no affirmative evidence that the wife had resided ninety days in Florida as required by Florida law, prior to instituting her divorce suit. Hence the court below held the third marriage was void.

As under *Coe* v. *Coe*, 334 U. S. 378 the father could not assail the Florida decree, the question is presented whether the court below has not violated the Full and Credit Clause of the Federal Constitution and 28 U.S.C. 1738 by permitting the daughter to do so after his death. After all, the father's right to will his daughter property is subject to the widow's claim resulting from a marriage he cannot under *Coe* v. *Coe*, *supra*, assail.

## Statement

The petitioner, Genevieve Johnson, married the decedent, E. Bruce Johnson, on the 19th day of February, 1944, at Great Neck, New York (R. 22). The decedent died June

[1] The first wife died and decedent married Madoline Ham, wife No. 2.

29, 1945 (R. 23), leaving a Last Will and Testament dated April 21, 1943, which was duly admitted to Probate in the Surrogates Court of Nassau County on August 27th, 1945, Eric Muelberger, Jr., being appointed executor (R. 4). By the terms of the Will the decedent beqeathed his entire estate to the respondent, Eleanor Muelberger (R. 4).

Following Probate Proceedings the Petitioner, Genevieve Johnson, his widow, filed a notice pursuant to Section 18 of the Decedent's Estate Law of the State of New York declaring her election, as widow, to take against decedent's Will her intestate share of his estate (R. 4). Thereupon the respondent, Eleanor Muelberger, instituted a proceeding under Section 145a of the Surrogates Court Act of the State of New York to obtain a determination of the validity of such election (R. 3).

The respondent, Eleanor Muelberger, is the wife of the executor, Eric Muelberger, and is a daughter of the decedent by his first marriage (R. 29, 45). After the death of his first wife, the decedent in 1939 married Madoline Ham, from whom he was divorced in 1942 by a Florida Decree (R. 12, 40).

In such divorce action instituted by the second wife, Madoline Ham Johnson, the decedent appeared by Attorney and interposed an answer denying the wrongful acts, but not questioning the allegations as to her residence in Florida. Testimony was taken by the Florida Court and the divorce granted Madoline Ham Johnson (R. 12, 39).

The respondent, Eleanor Muelberger, claimed below that the petitioner, Genevieve Johnson, the widow of the decedent could not be his lawful widow due the fact that the divorce obtained by Madoline Ham Johnson, the second wife, was invalid because of failure to comply with residential requirements and that the same was obtained in the State of Florida by sham and fraud (R. 5). The evidence ad-

duced upon the trial in the Surrogates Court of Nassau County with reference to the disputed divorce discloses that prior to the divorce both husband and wife resided in Garden City, New York until sometime before Thanskgiving of 1941 (R. 36) at which time Madoline Ham Johnson left her husband and went to Florida, where she instituted an action for divorce against her husband in November 1941, in which the decedent appeared and did not contest the jurisdiction. This action was discontinued and dismissed in February 1942 (R. 26, 46). Afterwards, Madoline Ham Johnson returned to decedent at Garden City, New York (R. 31, 46). During the month of April, 1942, she again left the decedent and went to live in West Hempstead, New York (R. 13, 31). On or about June 7, 1942, the itinerant second wife again left New York for Pensacola, Florida, where she resided (R. 15, 21).

On July 29, 1942, Madoline Ham Johnson for the second time filed a bill of complaint against the decedent for an absolute divorce in the Court of Record in Escambia County, Florida, out of which a final decree of divorce was entered against the decedent on August 17, 1942 (R. 11, 40). This is the decree attacked by the respondent, Eleanor Muelberger, even though her father appeared in the action by a firm of attorneys and contested the major allegations of misconduct, but did not contest the jurisdiction of the Court (R. 11, 39).

After trial the Surrogates Court of Nassau County rejected the contentions of Eleanor Muelberger, the respondent, and found for the petitioner declaring her to be the widow of decedent (R. 39). The Appellate Division of the Supreme Court of the State of New York Second Judicial Department at Brooklyn, New York, unanimously affirmed the findings of the trial court (R. 44).

However, the Court of Appeals of the State of New York

reversed the findings of both lower Courts and directed judgment for respondent, Eleanor Muelberger (R. 51).

In effect the court held that while under *Davis* v. *Davis*, 305 U. S. 32, 40, *Sherrer* v. *Sherrer* and *Coe* v. *Coe*, 334 U. S. 378, 384, the *decedent*, after appearance, could not attack the Florida decree, a stranger could do so under the dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, 232 (R. 48, 49). The court went on to hold that under Florida law (Fla. Stat. 65.02) proof of ninety days residence could not be supplied by admission of the parties and hence the Florida divorce was void.

## Specification of Errors to Be Urged

The Court below erred in refusing to give full faith and credit to the Florida Court's decree of divorce of decedent from Madoline Ham Johnson.

## Way in Which Federal Question Was Raised

The Full Faith and Credit clause and the Federal Statute (28 U.S.C. Sec. 1737) were asserted by petitioner's motion to dismiss filed in the trial court (R. 22). It was the basis of the ruling of the Surrogate (R. 39) and the affirmance by the Appellate Division (R. 44). It was discussed by the court below in its opinion (R. 49) and its alleged inapplicability is the obvious basis for its judgment.

## Summary of Argument

1. The decided cases, in this Court, *infra*, are dispositive of the inability of the father of petitioner in this case to do what the Court of Appeals of the State of New York has permitted petitioner to do. Neither her father nor his wife could have challenged the Florida decree herein on jurisdictional grounds. The decision of the Court below, however, confers upon the father through petitioner the ability after

death in substance to do by will what he could not have done during his life time. Thus it seems incongruous for example to hold that he could not pass title to his real estate during his life time, free and clear of the wife's inchoate right to dower, yet, at the same time, he could accomplish the same effect after death by devising his real estate to his daughter, knowing she could bar his widow's right to dower by then successfully attacking the validity of the divorce decree. This, too, in the face of the fact that every right the daughter claims derives from her father and that he, as husband, was estopped during his life time to deprive his wife of any right which accrued to her from that marriage relation which both parties assumed in good faith and maintained until the husband's death. As between the daughter and the wife here the daughter ought not to be construed to be a "stranger" in the sense of *Williams* v. *North Carolina*, 325 U. S. 226, 230. *Williams* v. *North Carolina* should not be expanded within the facts of this record to permit the respondent herein to question the validity of the divorce decree which her father could not have assailed.

II. It is respectfully submitted that the Court of Appeals below failed to take into consideration the more recent decisions of the State of Florida on the right successfully to challenge the validity of a decree of divorce in a collateral attack in the courts of that State by producing proof of fraudulent circumstances under which the decree was obtained. The respondent herein being neither a party to the action which matured to the decree attacked here, nor entitled to manage said action nor appeal from it, ought not to be allowed to impeach it now when the widow of her father seeks to assert her right as widow in the property of her deceased husband. *deMarigny* v. *deMarigny* and *Gaylord* v. *Gaylord*, *infra*, deny the right thus successfully to challenge the validity of this decree in the courts of Florida.

## Point I

**Respondent, Eleanor Muelberger, as derivative successor to deceased father, is estopped from collaterally attacking in the State of New York a decree of divorce granted by a Florida Court in which proceeding father and former spouse appeared and participated.**

The United States Supreme Court in *Coe* v. *Coe*, 334 U. S. 378, *Davis* v. *Davis*, 305 U. S. 32, and *Sherrer* v. *Sherrer*, 334 U. S. 343, enunciated the principle that a spouse who participates in a divorce decree is thereafter precluded from attacking its validity in a sister state.

The question raised now and not heretofore precisely decided by this Court is whether the rule propounded in the above cited cases should not be extended to embrace children of a prior marriage or third persons, so as to prohibit a collateral attack upon a decree of divorce such as was granted below. In *Stoll* v. *Gottlieb*, 305 U. S. 165, the Court says:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end litigation as that there should be a place to begin litigation. After a party has his day in Court, with opportunity to present his evidence and his view of law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

*Sherrer* v. *Sherrer*, *supra* (at pp. 355-356), reiterated in essence the rule of the *Stoll* case in the following language:

> "The Full Faith and Credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation. If in its

> application local policy must at time be required to give way, such 'is part of the price of our federal system'. Williams *v.* North Carolina, 317 U. S. 287 . . . We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. That vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation. And where a decree of divorce is rendered by a competent court under the circumstances of this case (Sherrer), the obligation of the full faith and credit clause requires that such litigation should end in the courts of the State in which the judgment was rendered."

Petitioner contends that respondent, being an heir at law, stands in the shoes of the ancestor and that she is, therefore, estopped to question anything that the ancestor was estopped from asserting. A situation similar to the one before the Court occurred in *Watson* v. *Watson*, 174 S. E. 33, 172 S. C. 362 (1934). In that case the decedent obtained a divorce in Nevada from his wife who resided in South Carolina. The wife was served with a summons in the State of South Carolina but did not appear in the action. Subsequently, the husband remarried and lived with his second spouse for a period of five years and then died. His child by the first marriage sought to cut off the dower right of wife No. 2 by attacking the Nevada decree. The Court, in deciding in favor of Wife No. 2, said:

> "This action is one relating solely to property rights unaffected by any considerations which give to the marriage relation its precise status. (Wey *v.* Wey, 132 S. C. 294, 128 S. E. 705). So here we are dealing only with property rights and the action of the husband

in procuring wife No. 2 to marry him on the assumption that he had a good divorce and was entitled to marry and this estops him from denying to her the right in his property to which she would be entitled had his assumption been true. She changed her position materially and rendered near five years, etc. in consideration of his leading her to believe that he had a right to marry her and he and his heirs now when it comes to the disposition of his estate are estopped from denying her the rights to which she would be entitled had the divorce been valid and of force in South Carolina."

Petitioner submits that to sustain the holding herein will permit a child of a prior marriage to contest the validity of a divorce between her parent and a second wife and pave the way for collateral attack by any ordinary legatee. Such holding will effect utter chaos and make a second marriage so dangerous that the legitimacy of a portion of the populace would be seriously questioned.

The decision below seems plainly violative of this Court's holding in *Coe* v. *Coe*, 334 U. S. 378, wherein the defendant wife admitted as true the husband's allegations of Nevada residence and the Nevada Court entered a divorce decree in favor of the wife. This court held that the wife could not later attack the Nevada decree in Massachusetts because, this Court held, the decree "was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunities to contest the jurisdictional issues." The court below conceded that on this ground neither the decedent nor his then wife could thereafter challenge the Florida decree on jurisdictional grounds, citing *Davis* v. *Davis*, 305 U. S. 32, 40, and *Sherrer* v. *Sherrer*, 334 U. S. 343, 351. However, it seized upon this Court's dictum in *Williams* v. *North Carolina*, 325 U. S. 226, 230, that "those not parties to a litigation ought not to be foreclosed by the

interested actions of others" and on this basis held that the daughter by the first marriage could attack the jurisdiction of the Florida court in order to bar the widow.

It seems clear that the court below misapplied the *Williams* case which was limited to the power of a sovereign *State* to ascertain, in a criminal trial, the evidence of a crucial jurisdictional fact in foreign divorce proceedings (*Williams*, Op. p. 230). There being no question, under *Coe* v. *Coe*, *supra*, of the binding effect of the Florida divorce upon decedent, the effect of the decision below is retroactively to loose the chains that bind him to the Florida decree by allowing him to make a Will barring petitioner, his present wife. It is incongruous to say that the decedent is bound by the Florida decree but that his daughter, the recipient of his munificence by Will, may ignore it and eliminate the widow whose right to her widow's portion has vested by a marriage her husband could not assail under *Coe* v. *Coe*, *supra*. It must be remembered that the daughter's right to contest the widow's election under Section 145a of the Surrogate's Court Act flows from her status as sole beneficiary under the Will.[2] Hence she is not, in any sense, a "stranger" in the sense of *Williams* v. *North Carolina*, 325 U. S. 226, 230 but can take only such property as her father possessed under the Full Faith and Credit clause as the result of the Florida divorce and his subsequent marriage.

It would seem important that this Court's holding in *Williams* v. *North Carolina*, 325 U. S. 226 at 230, should not be expanded to permit a daughter whose only right

[2] Sec. 145-a of the Surrogates Court Act provides that "any person interested in obtaining a determination as to the validity or effect of any election to take an intestate share against the provisions of a will * * * may present * * * a petition setting forth the facts which show his interest * * * and the particular question concerning which he requests the determination of the court." 13 Gilbert-Bliss Civil Practice of New York Annotated Sec. 145-a.

flows from her father's Will to deny the validity of a divorce decree which the father himself cannot assail in making the Will. If this is permitted, particularly after the death of the father, doubt may be cast upon a divorce when one of the parties thereto is no longer alive to testify even as to jurisdictional facts. The legitimacy of children might even be questioned.

## Point II

**The Court of Appeals of the State of New York erred in concluding that the State of Florida permits a collateral attack by a stranger to a divorce decree.**

In the opinion of the Court of Appeals (R. 50) it is stated that the respondent herein could successfully challenge the validity of the decree of divorce in a collateral proceeding in the Courts of Florida by producing proof of fraudulent circumstances under which it was obtained. Apparently, the Court of Appeals overlooked the more recent decisions of Florida on that score, to wit: *deMarigny* v. *deMarigny*, 43 So. Sec. 442, decided December 20, 1949, and *Gaylord* v. *Gaylord*, 45 So. Sec. 507, decided April 11, 1950.

In *deMarigny* v. *deMarigny* the plaintiff sought to obtain a declaratory judgment declaring void a divorce obtained by the defendant from his first wife in the state of Florida. She based her case upon the inadequacy of residence of the plaintiff in the divorce proceeding because of the fact that she was in the state of Florida on a temporary visitor's visa from her native France and further that, in addition to the foregoing infirmity, the Court did not and could not acquire jurisdiction of the parties or subject matter because the plaintiff in such divorce proceeding did not reside in the state of Florida for more than ninety days preceding the

filing of her bill of complaint. It was also contended that the plaintiff in said divorce action returned to her home in France immediately following the entry of the final decree of divorce. The Court, in dismissing the action, said:

> "Assuming that the court should, in a sense, represent the State as an interested third party in a proceeding of this kind, it is our view that the interests of society would be better served by an adoption of the lesser of two evils—non datur tertium. We mean that if the parties are left as the court found them an alleged fraud upon the court might thus appear to be sanctioned; yet, on the other hand, a judgment favorable to appellant-petitioner would amount to a judicial determination that both the appellant-petitioner and the appellant-respondent Alfred F. deMarigny had lived in a manifest state of adultery and would open wide an avenue for fraud (not to mention blackmail) of a character most difficult to discover. If the appellant-petitioner may maintain the instant suit it would be possible for any party to a fraudulent divorce decree, which is valid on the face of the record, to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly. It is our conclusion that the lesser evil would result from a judgment unfavorable to the appellant-petitioner's position and that decency, good morals and the welfare of society would be more nearly satisfied by such ruling. Certainly, such a decision would be less inimicable to the interests of our citizens as a whole than one favorable to the appellant-petitioner for the latter, in our opinion, could lead to "widespread social disorder". See *Shea* v. *Shea*, 270 App. Div. 527, N. Y. S. 2d 823, at page 827.

The decree of divorce which is under attack by the appellant-petitioner has not adversely affected the status or rights of the appellant-petitioner which existed at the time of the entry of said decree. Indeed,

it has protected her (and such protection continues) in her after-acquired marital status for without it her relationship with deMarigny necessarily would have been classified as meretricious.

As aforestated, the appellant-petitioner was neither defrauded nor injured for she occupied no status and had no rights at the time of the entry of the divorce decree sought to be invalidated which were or could have been affected thereby. The law on this subject is as stated in Freeman on Judgments, Vol. 1, page 636, Section 319: "It must not, however, be understood that all strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect would be prejudiced in regard to some preexisting right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause, nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them as so to affect rights or interests acquired prior to its rendition."

In *Gaylord* v. *Gaylord*, *supra*, the plaintiff sued the defendant for divorce in the State of Florida. The defendant, as a defense to the action, alleged that the plaintiff had participated in a divorce proceeding in Alabama which was defective due to inadequacy of residence in that State; that, as a consequence, she was not lawfully divorced from her previous husband and, therefore, could not legally institute a divorce proceeding in Florida. The Court, in dismissing the defense interposed by defendant, said:

"The Alabama decree (if in the pleading before us for consideration the respondent actually occupies the role of defender) did not adversely affect "rights or interests" acquired by him prior to its rendition. Said decree stands, insofar as the face of the record is concerned, valid and unimpeached. The facts alleged in the counterclaim and cross-complaint as a basis for its invalidity can be established only by evidence dehors the record. It must be presumed that the Alabama

court which entered the challenged decree was a court of competent jurisdiction. Consequently, its decree is, at most, voidable only.

Respondent asserts that the law in the State of Alabama differs from our law in that it allows a collateral attack upon a decree which is valid on the face of the record. Our law is contra and we know of no rule or principle which requires or will permit us to invalidate such a final decree or judgment of a court of a foreign jurisdiction. The proper forum in which to attack the validity of such decree, (if, indeed, it may be attacked by the respondent in any court) is the jurisdiction in which it was rendered. We should not attempt to determine the validity of a decree of a sister state or of a foreign country. More certainly, we should not do so unless something appears on the face of the record which discloses its invalidity. The most we should do is to decide in proper cases (within which category this case does not fall) whether foreign decrees should be accorded recognition by the courts of Florida under the full faith and credit clause of the Federal Constitution, Art. 4, Sec. 1, or the rule of comity."

## Conclusion

The judgment of the Court of Appeals of the State of New York should in all respects be reversed.

Respectfully submitted,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
*1000 Bowen Building, N. W.,*
*Washington, D. C.,*
*Attorneys for Petitioner.*

JOHN H. MUNLEY, ESQ.,
GEORGE J. MEADE, ESQ.,
*Great Neck, New York,*
*Of Counsel.*